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14   **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION
15

16   FINJAN, INC., a Delaware Corporation,   Case No. 5:17-cv-00072-BLF (SVK)

17   Plaintiff,   **FINJAN, INC.'S NOTICE OF**
MOTION AND MOTION FOR LEAVE TO
18   v.   **FILE MOTION FOR**
RECONSIDERATION OF THE COURT'S
19   **ORDER ON CISCO'S MOTION TO**
CISCO SYSTEMS, INC., a California   **STRIKE PORTIONS OF FINJAN'S**
20   Corporation,   **AMENDED EXPERT REPORTS (DKT.**
NO. 582)
21   Defendant.
22   **REDACTED VERSION OF DOCUMENT**
SOUGHT TO BE SEALED
23
24   Hon. Susan van Keulen
Ctrm: 6, 4th Floor
25

26

27

28

Case No. 5:17-cv-00072-BLF (SVK)
FINJAN, INC.'S MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE
MOTION FOR RECONSIDERATION

PLEASE TAKE NOTICE that Plaintiff Finjan, Inc. ("Finjan") hereby moves for leave to file a Motion for Reconsideration of the Court's Order on Cisco's Motion to Strike Portions of Finjan's Amended Expert Reports (Dkt. No. 582).

Statement of Relief Requested: By and through this motion, Finjan seeks leave to file a Motion for Reconsideration of the Court's Order on Cisco's Motion to Strike Portions of Finjan's Amended Expert Reports (Dkt. No. 582). This motion is supported by the following Memorandum of Points and Authorities and all supporting documents attached hereto.

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1   <u>**MEMORANDUM OF POINTS AND AUTHORITIES**</u>

2   **I.   INTRODUCTION**

3   Finjan respectfully requests that the Court grant Finjan leave to move for reconsideration

4   of the Court's ruling on Cisco's Motion to Strike Portions of Finjan's Amended Expert Reports

5   (Dkt. No. 582). Finjan did not have an opportunity to address Cisco's post-hearing submission

6   (which identified for the first time paragraphs Cisco wanted struck from Dr. Medvidovic's

7   amended reports), and Finjan believes that this resulted in the Court not considering facts and

8   arguments showing that the struck language had support in Finjan's infringement contentions.

9   Finjan also believes that the Court did not consider key evidence and arguments showing that the

10   concepts of a "virtual environment agent" and "parameters to run the sample file or URL" as they

11   appear in Dr. Medvidovic's amended reports were appropriately disclosed in Finjan's

12   infringement contentions.

13   **II.   STATEMENT OF ISSUES TO BE DECIDED**

14   1) Whether the Court should grant Finjan leave to file a Motion for Reconsideration of the

15   Court's Order on Cisco's Motion to Strike Portions of Finjan's Amended Expert Reports (Dkt.

16   No. 582).

17   **III.   LEGAL STANDARD**

18   Leave to file a Motion for Reconsideration may be granted when a party shows (i)

19   reasonable diligence in bringing the motion and (ii) "[a] manifest failure by the Court to consider

20   material facts or dispositive legal arguments which were presented to the Court before such

21   interlocutory order." Civil L.R. 7-9. Additionally, in Judge Freeman's May 1, 2020 Order, Judge

22   Freeman stated that:

23   "The undersigned held a Final Pretrial Conference on April 30, 2020. In that
             Conference, counsel for Finjan indicated that Finjan intends to appeal from the SVK
24   Order to this Court on two grounds: (1) ***a procedural issue – because Finjan did not
             have an opportunity to oppose Cisco's post-hearing submission*** at ECF 558 and (2)
25   Judge van Keulen's substantive ruling. ***The Court construes the procedural dispute
             as a request to file a motion for reconsideration*** of the SVK Order. Accordingly,
26   the Court REFERS the procedural dispute to Judge van Keulen to decide whether a
             motion for reconsideration is appropriate."
27

28

1   Dkt. No. 609 (emphasis added); *see also* Dkt. No. 613 (Pre-Trial Conference Hrg. Tr.) at

2   103:17-104:6.

3   **IV.   BACKGROUND**

4   This motion is necessary because of Cisco's shifting complaints regarding Finjan's

5   infringement contentions for the "mobile protection code" limitation ("MPC") of U.S. Patent No.

6   7,647,633 ("the '633 Patent"). MPC is code that is involved in the monitoring and analysis of

7   potentially malicious code (such as a virus). *See, e.g.,* '633 Pat. at cl. 14. Cisco alleges that

8   Finjan's expert relies on theories for the MPC limitation that Finjan did not disclose in its

9   infringement contentions. But at every turn, Cisco has changed its tune as to what is supposedly

10   missing from Finjan's contentions.

11   Cisco contended in its opening Motion to Strike that Finjan's contentions did not disclose

12   (1) "a theory in which the alleged MPC is already at the sandbox"; and (2) "the 7 specific

13   components [alleged to satisfy the MPC limitation]." Dkt. No. 491-3 at 3. Cisco's brief focused

14   on its first argument, making only passing reference to its second argument. *See* Dkt. No. 491-3 at

15   7-10. For example, the entirety of Cisco's argument regarding the "███████████" component

16   was four lines and merely made the point that the phrase was not included in Finjan's proposed

17   supplemental contentions. *See* Dkt. No. 491-3 at 10:10-13.

18   In response, Finjan identified references in its contentions to a "virtual environment agent"

19   that "executed within the virtual environment" (i.e., did not require transmission to the sandbox):

20   "Cisco AMP for Networks meet the recited claim language because Cisco AMP for Networks

21   cause a ***virtual environment agent (mobile protection code) to be executed within the virtual***

22   ***environment*** running Windows operating system, Java Runtime Environment and/or Internet

23   Explorer (mobile code executor) at a downloadable-information destination (e.g., Threat Grid

24   and/or Talos)." Dkt. No. 507-4 at 2 (emphasis added); Dkt. No. 491-5 at 35. Cisco could not

25   credibly contend that this disclosure required the transmission of MPC, and instead dismissed this

26   passage as a "one-off" reference. *See* Dkt. No. 523-2 at 4.

27   In its reply and at the hearing, Cisco crystallized a completely new argument that focused

28   on the second issue. Instead of alleging a lack of notice of the ***codenames themselves*** ████

1   ███████████████████████ as it had done in its Opening Brief, Cisco focused on lack of

2   notice of the *replacement language* ("virtual environment agent" and "parameters to run the

3   sample file or URL") in Dr. Medvidović's expert report, arguing for the first time that this

4   replacement language failed to provide notice of the *functionality* corresponding to the

5   codenames. *Compare* Dkt. No. 491-3 at 10 *with* Dkt. No. 523-2 at 3-4; Dkt. No. 560 (April 21,

6   2020 Hearing Tr.) at 56-57. Indeed, during the hearing, this Court stated that it was hearing this

7   argument from Cisco for the "*first time*." *See* Dkt. No. 560 (April 21, 2020 Hearing Tr.) at 56:18-

8   25 (emphasis added).

9   Furthermore, for the first time *during rebuttal argument*, Cisco identified some

10   paragraphs in Finjan's expert reports that Cisco believed exceeded the scope of Finjan's

11   infringement contentions. Cisco added more than a hundred paragraphs to that identification in a

12   post-hearing submission. Dkt. No. 558-1. Afterwards, this Court issued an order striking certain

13   language in the paragraphs Cisco identified in that post-hearing submission for the ████████

14   ███████████████ theories on the grounds that the struck language did not have sufficient

15   support in Finjan's infringement contentions. *See* Dkt. No. 582.

16   **V.   ARGUMENT**

17   **A.   Finjan Did Not Have an Opportunity to Oppose Cisco's Post-Hearing
             Submission, Resulting in a Lack of Consideration of Facts and Arguments
18   Relating to Finjan's Transmission-Based Theories**

19   Cisco's briefing in this case failed to define a specific remedy, leaving both Finjan and this

20   Court to speculate as to what exactly Cisco sought to strike from Dr. Medvidovic's amended

21   reports. *See* Dkt. No. 560 (April 21, 2020 Hearing Tr.) at 65 (stating that it was "not clear" what

22   Cisco sought to strike). Unable to evaluate Cisco's abstract request, this Court asked Cisco during

23   the April 21, 2020 hearing to submit a list of specific paragraphs it wanted struck from Dr.

24   Medvidovic's amended reports. *See* Dkt. No. 560 (April 21, 2020 Hearing Tr.) at 66. Finjan was

25   never invited to submit a response and this Court struck language from nearly every paragraph

26   Cisco had identified for the █████████████████████ theories. Finjan respectfully

27   requests an opportunity to be heard on this issue.

28

First, Cisco cannot satisfy its burden on this issue through a post-hearing submission

listing more than 100 paragraphs, with no explanation as to why those specific paragraphs should

be struck. *See, e.g.*, Dkt. No. 419 (January 9, 2020 MSJ Hearing Tr. at 100) at 51 (Judge Freeman

instructing Finjan to "submit your modified report and then it will be [Cisco's] burden because

[Cisco] will have to object."); *Rembrandt Wireless Techs., LP v. Samsung Elecs. Co.*, No.

2:13CV213-JRG-RSP, 2015 WL 1848524, at *3 (E.D. Tex. Jan. 23, 2015) (denying Motion to

Strike because Plaintiff "failed to meet its burden"). Indeed, when Finjan had the burden, Judge

Freeman struck Finjan's expert reports after finding that "Cisco ha[d] no meaningful way to

respond" to Finjan's 100-page exhibit. *Cf.* Dkt. No. 397 (Order on Motions re Expert Reports) at

4. Cisco should be held to the same standard here where it has the burden and seeks to strike over

a hundred paragraphs from Dr. Medvidovic's amended reports, yet Finjan has had no meaningful

opportunity to respond.

Second, Cisco's complaints do not stand up substantively. Cisco identifies paragraph 656

as a "representative" example. Dkt. No. 558-1 at 2. The information disclosed in this paragraph is

the March 20, 2019 deposition testimony from Cisco's engineer De Beer. Finjan could not have

included Mr. De Beer's deposition testimony in its infringement contentions (dated November 30,

2017), but did disclose the underlying theory as best as it could without discovery. At a high

level, Mr. De Beer states that ███████████████████████████

████████████████████████████████████

████████████████████████████████████

██ As Finjan explained in its briefing, █████████████████

███████ is undoubtedly set forth in its infringement contentions. *See* Dkt. No. 507-4 at 8;

Dkt. No. 491-5 at 36 (describing the monitoring of a downloadable through "static and dynamic

analysis, which includes sandbox analysis, based upon the determination that the downloadable-

information includes executable code"). The three other paragraphs that Cisco identifies in its

submission for the "███████" component are similar excerpts from De Beer's deposition.

In fact, many of the paragraphs where this Court struck Finjan's replacement language are

relevant for reasons *other* than supporting Finjan's sandbox-only theory. Finjan presented

1   argument in its briefing and at the hearing explaining that the replacement language here ("virtual

2   environment agent" and "parameters to run the sample file or URL") is not offered only on the

3   basis of a sandbox-only theory. *See, e.g.*, Dkt. No. 560 (April 21, 2020 Hearing Tr.) at 44-46;

4   Dkt. No. 507-4 at 7; *see also* Dkt. No. 419 (January 9, 2020 MSJ Hearing Tr.) at 100; Dkt. No.

5   487 at 16-20. For example, this replacement language is also relevant to Finjan's transmission-

6   based theories, which were undisputedly in Finjan's contentions. While Cisco represented to this

7   Court that Finjan "abandoned" infringement theories relying on components transmitted to the

8   sandbox, *see, e.g.*, Dkt. No. 491-3 at 5, 10, the excerpt Cisco cites is a footnote in Finjan's

9   summary judgment briefing stating only that Finjan is not relying upon RESTful APIs as MPC.

10   *See* Dkt. No. 400-4 at 13 ("While Finjan disagrees with Cisco's arguments regarding APIs, it is

11   irrelevant because Finjan has not identified RESTful APIs as MPC and what Finjan identified as

12   MPC is discussed in detail below.").

13   Thus, Finjan submits that even if this Court finds that the replacement language is not

14   supported in its infringement contentions on the basis of a sandbox-only theory, the Court should

15   still consider that the replacement language is supported in Finjan's contentions in support of

16   another theory. Finjan believes that if the Court had considered this argument, it would not have

17   struck the language Cisco requested. Rather, the Court would have determined that the proper

18   remedy, if any (Finjan maintains there should be none), would be a limiting instruction at trial.

19   Finally, if the Court decides to maintain its ruling, Finjan respectfully asks the Court for

20   clarity regarding the precise contours of what has been struck from Dr. Medvidovic's amended

21   reports. In particular, the Court's Order "STRIKES the replacement language" in the paragraphs

22   Cisco identified. Dkt. No. 582 at 15. Finjan interprets this Order to encompass *only* the

23   replacement language for ███████████████████████████████████ In the event the Court

24   maintains its ruling, the Court's limited order striking only this replacement language is

25   appropriate here because many of the struck paragraphs contain evidence (such as deposition

26   testimony) not limited to the theory Cisco was moving to strike. *See, e.g.*, Dkt. No. 507-10 (Dr.

27   Medvidovic March 30, 2020 Rpt.) ¶¶ 460, 463, 464, 465, 632, 656, 657, 690, 904, 4331, 4332,

28   4333, 4334, 4335, 4336, 4337, 4481, 4482, 4483, 4484, 4485, 4486, 4487, 4489, 4492, 4493,

1 4494, 4495. Nevertheless, Finjan requests clarity regarding whether the Court has (i) struck only

2 the replacement language for ████████████████████████ (ii) struck

3 sentences containing the replacement language; or (iii) struck the entire paragraphs containing the

4 replacement language.

5   **B.**   **Lack of Consideration of Facts and Arguments Relating to "Virtual Environment Agent"**

6

7   This Court's Order on Cisco's Motion to Strike sets forth the following rationale for

8 granting Cisco's motion with respect to the term "virtual environment agent":

9 > Finjan has **presented no evidence** that the 'virtual environment agent' described in
the Operative Contentions is in any way related to the functionality now described

10 > as a 'virtual environment agent' in the March 2020 Report and previously described
as a ████████ in the July 2019 and December 2019 Reports. Although Finjan

11 > asserts that this functionality 'clearly map[s] to a virtual environment agent residing
in a sandbox,' it **fatally cites no evidence in the Operative Contentions or**

12 > **elsewhere in support of this assertion**.

13 Dkt. No. 582 at 11-12 (emphasis added). However, Finjan respectfully submits that it presented

14 evidence that its contentions identified virtual environment agent functionality residing at the

15 sandbox. After Cisco complained in its reply (for the first time) that it did not understand the

16 "virtual environment agent" to correspond to the ████████ residing at the sandbox, Finjan

17 submitted additional evidence at the April 21, 2020 hearing showing that Cisco's own engineers

18 understand a virtual environment agent to be equivalent in functionality to the ████████

19 residing at the sandbox. *See* Dkt. No. 560 (April 21, 2020 Hearing Tr.) at 41-43.

20   Indeed, Finjan's Opposition shows that the very second sentence in Finjan's infringement

21 contentions for the MPC limitation discloses that the virtual environment agent executes at the

22 sandbox (i.e., the virtual environment). Dkt. No. 507-4 at 2; Dkt. No. 491-5 at 35 ("Cisco AMP

23 for Networks meet the recited claim language because Cisco AMP for Networks **cause a virtual**

24 **environment agent (mobile protection code) to be executed within the virtual environment [i.e.,**

25 **the sandbox] running Windows operating system**, Java Runtime Environment and/or Internet

26 Explorer (mobile code executor) at a downloadable-information destination (e.g., Threat Grid

27 and/or Talos.") (emphasis added). This statement should have given Cisco notice that the virtual

28 environment agent could reside in the sandbox.

1   Perhaps recognizing this, Cisco shifted focus in its reply from arguing that Finjan failed to

2   disclose any sandbox-only theories to arguing that Finjan never mapped a virtual environment

3   agent to the functionality corresponding to "███████████." *See* Dtk. No. 523-2. Cisco made

4   this argument without ever explaining what "███████████" is, leaving this Court to speculate

5   as to what was allegedly missing from Finjan's contentions. However, Finjan's contentions refer

6   to the virtual environment agent as having the same functionality as a "█████████":

7   monitoring and analyzing potentially malicious code. *See, e.g.,* Dkt. No. 491-5 (Finjan

8   Infringement Contentions) at 5.

9   ██

10   ██

11   ██████████████ █████████████████

12   ██

13   ██

14   ████████████████████████████ Similarly, Finjan's

15   infringement contentions ascribe the very same functionality to the virtual environment agent. To

16   illustrate this point, Finjan provided exemplary evidence at the April 21, 2020 hearing showing

17   that Finjan's contentions refer to the "virtual environment agent" as a component involved in

18   "sandboxing." Dkt. No. 491-5 (Finjan Infringement Contentions) at 5 ("Cisco AMP for Networks

19   configure ***a virtual environment agent (e.g., sandboxing)*** for intercepting and monitoring []

20   suspicious traffic….") (emphasis added); Dkt. No. 560 (April 21, 2020 Hearing Tr.) at 39-40.

21   "Sandboxing" is a technical term that refers to the monitoring of code in an isolated virtual

22   environment (in this case, potentially malicious code). *See, e.g.,* Cisco Website

23   (https://www.cisco.com/c/m/en_us/training-events/events-webinars/webinars/sandboxing.html)

24   ("We've seen a spike in the use [*sic*] ***dynamic malware analysis, commonly referred to as***

25   ***sandboxing,*** to uncover these advanced threats.") (emphasis added); *see also* Cisco Blog

26   (https://blogs.cisco.com/security/amp-threat-grid-integrates-with-tripwire-enterprise) (referring to

27   "traditional sandboxing technologies" as those that "extract suspicious samples, analyze in a local

28   virtual machine, and quarantine"). Thus, Finjan argued at the hearing that the aforementioned

statements in Finjan's infringement contentions expressly linking "sandboxing" functions to a

virtual environment agent involved in "monitoring" provided Cisco sufficient notice that the

component responsible for those functions (███████████) was at issue. Dkt. No. 560 at

40:2-18.

Finjan presented additional evidence at the hearing showing that Finjan's contentions refer

to the virtual environment agent as performing the same functionality as a ███████████.

Specifically, Counsel for Finjan offered evidence of Cisco's own engineers using the phrase

"virtual environment agent" and "█████████" to describe the same functionality:

███████████	███████████
████████████████████	████████████████████
██████████████████	████████████████████
█████████████████	███████████████████
███████████████	██████████████████
████████████████████	████████████████████
████████████████████	████████████████████
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████████████████████	████████████████████
███████████████████	██████████████████
████████████████	█████████
██████████	

████████████████████████████████

██████████ *see also* Dkt. No. 560 (April 21, 2020 Hearing Tr.) at 41-43. The fact that Cisco

uses the phrase "virtual environment agent" interchangeably with "█████████" buttresses

Finjan's contention that Finjan's disclosure of a "virtual environment agent" in Finjan's

infringement contentions would have put Cisco on notice of the functionality associated with

"█████████" (namely, that the "virtual environment agent" can reside at the sandbox). *See*

Dkt. No. 560 (April 21, 2020 Hearing Tr.) at 41-43.

FINJAN INC.'S MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

1   One reason that the Court may have concluded that Finjan failed to present evidence on

2   this matter is because some of the aforementioned evidence was raised for the first time at the

3   April 21, 2020 hearing. Finjan requests that the Court consider that Cisco's reply brief introduced

4   new arguments, thus making it necessary for Finjan to offer a response to those new arguments for

5   the first time at the hearing (albeit a limited response due to the nature of the hearing). *See supra*.

6   **C.   Lack of Consideration of Facts and Arguments Relating to "Parameters to**
           Run the Sample File or URL"
7

8   This Court's Order provides three rationales for granting Cisco's motion with respect to

9   the "parameters to run the sample file or URL" replacement language: (i) "fail[ure] to show how

10 [the] language in the Operative Contentions is linked to the functionality now associated with that

11 language in Dr. Medvidovic's amended reports"; (ii) that "the phrase 'parameters to run the

12 sample file or URL' does not uniquely describe ███████████████████"; and (iii) that "Finjan

13 previously sought but was denied permission to add ███████████████████ to its

14 infringement contentions" and so the replacement language for those terms should be stricken.

15 Dkt. No. 582 at 12-13. But because of the way Cisco's argument has evolved, Finjan has not had

16 an opportunity to squarely address these issues thereby depriving this Court of the ability to

17 consider all relevant facts and arguments.

18   **1.   Evidence and Argument Showing Finjan Disclosed in its Infringement**
                Contentions the Theories Relevant to ███████████████████
19   **Relating to the Paragraphs the Court Struck from Dr. Medvidovic's**
                Report
20

21   Finjan first reiterates its arguments in Sections IV-V(A): Cisco's shifting-sands argument

22 created a procedural dispute because Finjan did not have an opportunity to fully address Cisco's

23 arguments, and further, Cisco's post-hearing identification of specific paragraphs to be struck does

24 not withstand proper scrutiny. For example, of the paragraphs identified in Cisco's post-hearing

25 submission for the March 2020 amended report that are relevant to ███████████████ at

26 least 79 of the paragraphs concern claims that are no longer at issue (Dkt. No. 507-10 ¶¶ 1363,

27 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512,

28 1513, 1514, 1595, 1596, 1597, 1599, 1600, 1601, 1602, 1603, 2359, 2494, 2495, 2496, 2497,

1   2498, 2499, 2500, 2501, 2502, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2620, 2621,

2   2622, 2623,2624, 2625, 2626, 2627, 2628, 3399, 3534, 3535, 3536, 3537, 3538, 3539, 3540, 3541,

3   3542, 3544, 3545, 3546, 3547, 3548, 3549, 3550, 3551, 3649, 3650, 3651, 3652, 3653, 3654,

4   3655, 3656, 3657), at least 28 paragraphs are largely deposition testimony of Cisco engineers

5   (which Finjan could not have disclosed in its original contentions) (Dkt. No. 507-10 ¶¶ 460, 463,

6   464, 465, 632, 656, 657, 690, 904, 4331, 4332, 4333, 4334, 4335, 4336, 4337, 4481, 4482, 4483,

7   4484, 4485, 4486, 4487, 4489, 4492, 4493, 4494, 4495), and the remaining paragraphs relate to

8   MPC theories that were properly disclosed (and even in its post-hearing submission, Cisco failed

9   to present any contrary evidence or argument).

10   Cisco's complaints also do not stand up substantively. Cisco uses paragraph 4331 as a

11 "representative" paragraph. The only reference to MPC in that three sentence paragraph is in a

12 parenthetical at the end of the second sentence:

13 ██

14 ██

15 ██

16 ████████████████████████████

17 Dkt. No. 507-10 ¶ 4331 (emphasis added). To the extent that Cisco seeks to strike the reference to

18 "parameters to run the sample file or URL," Finjan's infringement contentions squarely identify

19 those parameters as MPC: "The code and information pertaining to the task and parameters

20 relevant to Threat Grid and/or Talos is the mobile protection code. This information includes

21 information using RESTful API's (e.g., HTTP POST commands which run, execute, and/or

22 process a file or URL in a sandbox), *parameters to run the sample file or URL,* a hash of the file,

23 information contained in a ████████ which includes information regarding the sample or URL

24 (e.g., metadata of the sample, description of the sample, indicators of compromise, and/or

25 warnings that the information-destination should be aware of)." Dkt. No. 491-5 at 35.

26   The other two sentences in paragraph 4331 do not reference MPC. The first sentence is

27 largely a restatement of the claim limitation. *Compare* '633 Pat. at claim 14 ("causing mobile

28 protection code to be executed by the mobile code executor at a downloadable-information

1   destination such that one or more operations of the executable code at the destination, if attempted,

2   will be processed by the mobile protection code"); *with* Dkt. No. 507-10 ¶ 4331 ("Cisco Threat

3   Grid causes mobile protection code to be executed by the mobile code executor (e.g., Threat

4   Grid's sandbox) at a downloadable-information destination (e.g., the virtual machine instance in

5   which Threat Grid's sandbox is running) such that one or more operations of the executable code

6   at the destination, if attempted, will be processed by the mobile protection code"). The first

7   sentence also adds that the claimed "mobile code executor" is the Threat Grid sandbox and that the

8   claimed "downloadable-information destination" is the virtual machine instance at Threat Grid,

9   but Cisco does not dispute that Finjan properly disclosed those theories. The third sentence cites

10   to deposition testimony from a Cisco engineer, and does not relate to a MPC theory.

          Thus, Cisco cannot satisfy its burden merely through citing a laundry list of these

12   paragraphs.

13
          2.   **Evidence and Argument Showing the Phrase "Parameters to Run the**
14   **Sample File or URL" Describes** ████████████████████

15   Finjan understands the issue to now be whether the replacement language from Finjan's

16   infringement contentions (in this case, "parameters to run the sample file or URL") provides

17   sufficient notice of the ██████████████████ functionalities. Finjan's briefing cites

18   evidence showing that the replacement language ("parameters to run the sample file or URL") in

19   Finjan's infringement contentions also satisfies the functionality of being MPC. *See, e.g.,* Dkt.

20   No. 507-4 at 2. Cisco never substantively responded to this argument. Cisco instead argued that

21   the replacement language lacked specificity, because the replacement language potentially

22   encompassed other functionality as well. Dkt. No. 523-2 3-4. Cisco's argument is belied by its

23   own expert opinions. Ex. 1 (Expert Rpt. of Dr. Atul Prakash) ¶ 424 (referring to ████████ using

24   the very "parameters" replacement language that Cisco contends is not specific enough).

25   In short, Cisco effectively concedes that the replacement language would encompass

26   ██████████████████ and despite its complaints, fails to identify any meaningful

27   difference between the two and the replacement language. While Cisco now complains that

28   Finjan's disclosure here is not specific enough, it is not clear what additional disclosure Finjan

1   could have included in its infringement contentions based on information that was available to

2   Finjan.

3   **3.   Cisco's Prior Motion to Strike Is Not Relevant**

4   This Court's Order found that Finjan's replacement language corresponds to theories that

5   Finjan was previously denied permission to add to its infringement contentions. In a motion to

6   strike an expert report, the inquiry requires a comparison of the theories included in Finjan's

7   expert reports, and a determination as to whether those theories were properly disclosed in

8   Finjan's infringement contentions. *See e.g., MLC Intellectual Prop., LLC v. Micron Tech., Inc.*,

9   No. 14-CV-03657-SI, 2019 WL 1865921, at *2 (N.D. Cal. Apr. 25, 2019); *Apple Inc. v. Samsung*

10   *Elecs*. Co., No. 5:12-CV-0630-LHK-PSG, 2014 WL 12917334, at *2 (N.D. Cal. Jan. 9, 2014);

11   *Mobile Telecommunications Techs., LLC v. Blackberry Corp*., No. 3:12-CV-1652-M, 2016 WL

12   2907735, at *1-2 (N.D. Tex. May 17, 2016). Although the Court granted Cisco's prior motion to

13   strike, the outcome of that motion has no bearing on this inquiry.

14   Finjan understands this Court's finding here to represent this Court's *sua sponte* analysis

15   because Finjan was unable to find any corresponding argument in Cisco's briefing. Dkt. No. 582

16   at 12-13. This Court's reasoning for conducting this *sua sponte* analysis appears to have been

17   drawn from Judge Freeman's Order on Motions Re Expert Reports (Dkt. No. 397). *See* Dkt. No.

18   582 at 8. If this Court views this issue as dispositive, Finjan respectfully requests that the parties

19   have an opportunity to brief the issue.

20   **D.   Finjan Has Been Reasonably Diligent In Bringing This Motion**

21   This Court's Order on Cisco's Motion to Strike Portions of Finjan's Amended Expert

22   Reports (Dkt. No. 582) issued on April 28, 2020, although due to the Order being under seal, the

23   parties did not have access to the Order until April 29, 2020. Judge Freeman held the Pre-Trial

24   Conference for this case the following day, on April 30th, at which time Finjan informed Judge

25   Freeman of its intent to raise certain issues that are the subject of this motion. *See* Dkt. No. 613 at

26   103:17-104:6. On May 1, 2020, Judge Freeman issued an Order construing Finjan's request as

27   one to file a Motion for Reconsideration, and directing that the matter be referred to this Court.

28

1   *See* Dkt. No. 609. Finjan has exercised reasonable diligence by filing this motion within two

2   weeks after this Court's Order issued, and eleven days after Judge Freeman's Order issued.

3   **VI.   CONCLUSION**

4   For at least the foregoing reasons, Finjan respectfully requests that its Motion for Leave to

5   File a Motion for Reconsideration be granted. Additionally, if the Court finds the issue outlined

6   *supra* in Section V.C.3 to be dispositive, then Finjan respectfully requests that the parties have an

7   opportunity to brief the issue of whether Finjan's replacement language corresponds to theories

8   that Finjan was previously denied permission to add to its infringement contentions (including

9   whether this issue should be relevant to the present motion).

10

11   Dated: May 12, 2020   Respectfully Submitted,

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CERTIFICATE OF SERVICE

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      The undersigned hereby certifies that a true and correct copy of the above and foregoing

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document has been served on May 12, 2020 to all counsel of record who are deemed to have

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consented to electronic service via the Court's CM/ECF system. Any other counsel of record will

5

be served by electronic mail and regular mail.

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                                                         /s/ Aamir A. Kazi

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FINJAN INC.'S MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION